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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO MARTINEZ LIRA, Defendant and Appellant.	E054956 (Super.Ct.No. RIF1101233) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Reversed and remanded with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Rodolfo Martinez Lira pled guilty to one count of robbery. (Pen. Code, § 211.)[1] He also admitted that in the commission of the crime he personally used a firearm. (§ 12022.53, subd. (b).) In return, the remaining allegations were dismissed, and defendant was sentenced to a total term of 13 years in state prison with credit for time served. On appeal, defendant contends that his plea and admission must be withdrawn because the trial court misadvised him of the elements of the firearm use enhancement and failed to ensure there was an adequate factual basis for the plea. For the reasons explained below, we will reverse and remand the matter with directions.

I

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2011, a felony complaint was filed charging defendant with two counts of robbery (§ 211) with the use of a firearm (§ 12022.53, subd. (b)). The complaint further alleged that defendant had sustained one prior prison term. (§ 667.5, subd. (b).)

On August 30, 2011, the complaint was orally amended to add a third count of robbery (§ 211) along with an associated firearm use enhancement. Defendant then pled guilty to one count of robbery (count 1) and admitted the firearm use enhancement. In taking the plea, the following colloquy occurred between the court, defendant, and defense counsel:

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

"[DEFENSE COUNSEL]: Your Honor, I did convey to [defendant] the Court indicated, which was 12 years, but plead to all strikes.

"THE COURT: Yeah, this is actually a better deal for you, assuming you are not going to change your behavior. If you change your behavior, you're going to be good, all right? [¶] Did you go over the rights on the yellow form carefully with your lawyer?

"THE DEFENDANT: Yes, ma'am.

"THE COURT: Do you understand them?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand that when you sign the form and plead guilty and admit the allegation that you're giving up the rights on the form, because you're not going to trial and fighting your case?

"THE DEFENDANT: Yes, ma'am.

"THE COURT: Do you have any questions about anything?

"THE DEFENDANT: No.

"THE COURT: You know you're going to be serving this at 85 percent, right?

"THE DEFENDANT: Yes.

"THE COURT: Anything else?

"THE DEFENDANT: The only question I do have is if the law passes to 65, will I be eligible for that?

"THE COURT: No, you won't be, because the law tends to run forward and not backwards. So what it does is like there's going to be a big law change in October. It

wouldn't affect you anyway because it doesn't affect strike cases. . . . [¶] Does that make sense to you?

"THE DEFENDANT: Yeah.

"THE COURT: Any other questions?

"THE DEFENDANT: No, ma'am.

"THE COURT: Then as to Penal Code section 211, a felony and a strike, how do you plead?

"THE DEFENDANT: Guilty.

"THE COURT: And you admit the allegation under 12022.53(b) that you personally used a firearm?

"THE DEFENDANT: Oh, yeah.

"THE COURT: Did you have a—I understand it was a fake firearm or said it was a fake firearm, right?

"THE DEFENDANT: Yeah.

"THE COURT: And you know the Code doesn't care, because from the victim's point of view, it looks like a real firearm to them, right?

"THE DEFENDANT: Yeah.

"THE COURT: Counsel join?

"[DEFENSE COUNSEL]: Yes, Your Honor.

"THE COURT: After directly examining the defendant, the Court determines the defendant knowingly and intelligently waived his rights. He understands his charges and the consequences of his plea. [¶] Sir, is it true that on June 14th, 2011, in Riverside

County, you took, by means of force or fear, money from a person who was the store clerk?

"THE DEFENDANT: Yes, Your Honor.

"THE COURT: And when you did that, you used a firearm?

"THE DEFENDANT: Yes.

"THE COURT: And then in Count 2 – I'm going to ask you the same questions for all of them, even though we're dismissing some with the *Harvey*[2] waiver—the same day, you committed another robbery against another store clerk, correct, or gas station clerk, something like that?

"THE DEFENDANT: Yes, ma'am.

"THE COURT: And that was in Riverside County also?

"THE DEFENDANT: Yeah.

"THE COURT: And in that one, you also used that same gun?

"THE DEFENDANT: Yeah.

"THE COURT: And then you have a prior offense that you went to state prison for a car theft in March of 2008?

"THE DEFENDANT: Yeah.

"THE COURT: And then you have another robbery—that's the one they've added on and they're going to dismiss it—from 6/14/11, the same day. In other words

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[2] *People v. Harvey* (1979) 25 Cal.3d 754.

you did three separate robberies at three separate locations that same day using that same gun; is that right?

"THE DEFENDANT: Yes, ma'am.

"THE COURT: Really bad day. [¶] The court does find there's a factual basis for the plea and dismissed counts for the *Harvey* waiver."

Pursuant to the plea agreement, defendant was thereafter immediately sentenced to 13 years in state prison and the remaining charges were dismissed.

On November 7, 2011, defendant filed a notice of appeal and request for a certificate of probable cause based on ineffective assistance of counsel and coercion. In a letter filed on November 7, 2011, defendant requested to withdraw his plea based on ineffective assistance of counsel, claiming this was his second request but he had not heard back from the court. The court denied defendant's request to withdraw his guilty plea and granted his request for a certificate of probable cause.

II

DISCUSSION

Defendant argues that his plea must be withdrawn because the trial court misunderstood and failed to properly advise him of the elements of the firearm use enhancement and accepted his plea without ensuring an adequate factual basis for the plea.

A guilty plea is valid as long as the record affirmatively shows it is voluntary and intelligent under the totality of circumstances. (*People v. Mosby* (2004) 33 Cal.4th 353, 361.) A guilty plea is voluntary and intelligent when (1) it is made with the advice of

competent counsel; (2) the defendant was made aware of the nature of the charges against him; (3) the plea was not induced by harassment, improper threats of physical harm, coercion, or misrepresentations; and (4) there is nothing to show the defendant was incompetent or otherwise not in control of his mental faculties. (*Brady v. United States* (1970) 397 U.S. 742, 750-756 (*Brady*).)

Defendant claims that he was misadvised by the trial court and presumably by his counsel that a fake firearm was sufficient to support the gun use enhancement. Section 12022.53 provides for an enhancement of 10 years when a person uses "a firearm" in the commission of a robbery. (See § 12022.53, subds. (a)(4), (b).) Section 16520, subdivision (a), defines "firearm" for purposes of section 12022.53, subdivision (b), as "any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion." Under section 12022.53, subdivision (b), "[t]he firearm need not be operable or loaded for this enhancement to apply." There is no dispute that the trial court erred in stating that a "fake firearm" was sufficient to support the gun use enhancement.

The only real dispute is whether or not this error entitles defendant to withdraw the guilty plea underlying the judgment of conviction. As previously stated, a guilty plea is valid only if it was made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances, nature of the charges, including its elements, and likely consequences. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 183 (*Bradshaw*) [elements of charges]; *Brady, supra,* 397 U.S. at p. 748.) A guilty plea that is not knowingly or intelligently made is involuntary and cannot form the basis of a criminal

conviction, consistent with due process. (See *Brady*, at pp. 747-748 & fn. 4; *McCarthy v. United States* (1969) 394 U.S. 459, 466; U.S. Const., 5th & 14th Amends.) The same type of review applies to a defendant's admissions to enhancements. (*People v. Mosby*, *supra*, 33 Cal.4th at pp. 359-365.)

The United States Supreme Court has never held that a trial court must itself "explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. [Citation.] Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." (*Bradshaw*, *supra*, 545 U.S. at p. 183 [plea held to be valid where elements of charge were not described at time of plea, but attorneys represented that they had explained them to defendant and defendant confirmed this was true].) Indeed, "even without such an express representation [that the judge or defense counsel have explained the charge to defendant], it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." (*Henderson v. Morgan* (1976) 426 U.S. 637, 647.)

The People argue that defendant's guilty plea was voluntary because the record reflects he was informed by his counsel of the elements of the firearm use enhancement. However, there is no indication of this in the record. Rather, the record reflects that

defendant was *misadvised* concerning the elements of the firearm use enhancement, and his counsel "joined" in the admission and advisement that a fake firearm was sufficient to support the gun use enhancement. And there is no indication in the record that his counsel had *correctly* advised defendant, prior to entering his plea, regarding the elements of the enhancement. Although, as the People point out, defendant initialed and signed the plea form indicating he had adequate time to discuss the charges and defenses with his attorney and his counsel had signed the plea form noting defendant had adequate time to discuss the case with his counsel, there is nothing in the record to indicate that defense counsel had discussed the correct factual requirements of the gun use enhancement. After conducting an examination of the entire record, we conclude that defendant's admission to the gun use enhancement was not voluntary and intelligent under a totality of the circumstances.

The next question is whether the error was prejudicial to entitle defendant an opportunity to withdraw his plea. Defendant reasons that this error was a due process violation, entitling him to withdraw his plea under the harmless beyond a reasonable standard set forth in *Chapman v. California* (1967) 386 U.S. 18. The People counter that California case law requires that defendant demonstrate prejudice resulting from the misadvisement of the consequences of his plea in order to obtain a reversal.

California courts have held that a criminal defendant's right to be advised of the range of possible punishment before entering a guilty plea is a judicially declared rule of criminal procedure rather than a constitutionally compelled rule. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022, overruled on other grounds by *People v. Villalobos* (2012)

54 Cal.4th 177, 183; *In re Yurko* (1974) 10 Cal.3d 857, 864; *People v. McMillion* (1992) 2 Cal.App.4th 1363, 1370.) In such circumstances, the California Supreme Court requires that the error be prejudicial to the accused before the defendant is entitled to withdraw a guilty plea. (*People v. Walker*, at pp. 1022-1023; *In re Yurko*, at p. 864.) Under this analysis, we ask whether it is reasonably probable that the defendant might not have pled guilty if he had been correctly advised of the consequences of this decision before he entered his plea. (See *In re Moser* (1993) 6 Cal.4th 342, 352; *People v. Walker*, at p. 1023; see also *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

We find that we need not determine whether or not the error in this matter rose to the level of a constitutional violation. Even if we applied the lesser *Watson* test, we cannot find the error committed in this case was harmless. If defendant's counsel or the trial court had correctly advised defendant that a fake firearm cannot establish the elements of the gun use enhancement, then there would be no valid basis for the gun enhancement allegations, thus reducing defendant's maximum exposure drastically. On the other hand, by pleading to one count of robbery, defendant had benefited by only suffering one strike as opposed to three. Although arguably defendant received some benefit by pleading guilty, it is unknown under these circumstances if defendant would have entered into the plea had he been advised that a fake gun is insufficient to support the gun use enhancement. In other words, we conclude that it is reasonably probable that if defendant had known that a fake gun is insufficient to support the gun use enhancement

allegations, he might not have pled guilty.[3] It follows that the plea was not knowingly and intelligently made. (See *Bradshaw*, *supra*, 545 U.S. at p. 183; *Henderson v. Morgan*, *supra*, 426 U.S. at pp. 644-645 & fn. 13; *Brady*, *supra*, 397 U.S. at p. 748.)

Defendant's conviction based on the plea must therefore be reversed.[4]

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[3] Under this prejudice analysis, the defendant must offer evidence that he or she would not have pled guilty if he or she had known the true consequences of the plea. (See *People v. McClellan* (1993) 6 Cal.4th 367, 376-378.) Defendant's in propria persona statements included in his request for a certificate of probable cause and request to withdraw his guilty plea state that the plea was the result of "'ignorance of the law'" and "'coercion,'" because his trial counsel "lied" to him, "never tried to put together a defense," and was ineffective. Defendant also noted that there was "no gun" so "the gun enhancement should have been thrown out, or at least challenged." Although defendant's statements in his requests do not specifically assert that he would not have pled guilty had he been properly advised on the elements of the gun use enhancement, in the interest of judicial economy, we will find that defendant's assertions in his requests are sufficient to satisfy the requirement that defendant would not have pled guilty if he had known the true consequences of the plea.

[4] In light of this conclusion, we need not address the remaining issue raised in defendant's appeal of whether the trial court ensured an adequate factual basis for the plea.

We note that the People argue that if this court determines the trial court's comments render defendant's plea "as to the enhancement involuntary or that there was no factual basis for the enhancement, this case should be remanded to the trial court solely to deal with the enhancement." However, the People then assert that if defendant "refuses to admit to the enhancement and is allowed to withdraw his guilty plea, 'the status quo ante must be restored.'"

III

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to permit defendant to withdraw his plea and, if he elects to do so, to reinstate the dismissed charges and proceed accordingly. If he declines to withdraw his plea, the judgment of the superior court is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.